United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

CCA

76-7581

To be argued by:
W. SHELBY COATES, JR.
and
JOSEPH D. TARLOWE

IN THE

United States Court of Appeals

For the Second Circuit

INEZ H. LENFEST and MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK, as Executors of the Estate of Harold C. Lenfest, and KENNETH F. YARRINGTON,

Plaintiffs-Appellees,

against

HAROLD W. COLDWELL,

Defendant-Appellant.

FERRO-BET CORPORATION OF AMERICA,

Plaintiff-Appellee,

against

HAROLD W. COLDWELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT BRIEF FOR PLAINTIFFS-APPELLEES

W. SHELBY COATES, JR.
Appellate Counsel for Plaintiffs-Apellees in First Action
61 Broadway
New York, New York 10006

WILBUR E. DOW, JR.
Attorney for Plaintiffs-Appellees in First Action
80 Broad Street
New York, New York 10004

JOSEPH D. TARLOWE
Attorney for Plaintiff-Appellee in Second Action
11 Broadway
New York, New York 10004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 76-7581

—o—

INEZ H. LENFEST and MARINE MIDLAND GRACE TRUST COMPANY OF NEW YORK, as Executors of the Estate of Harold C. Lenfest, and KENNETH F. YARRINGTON,

Plaintiffs-Appellees,

against

HAROLD W. COLDWELL,

Defendant-Appellant.

FERRO-BET CORPORATION OF AMERICA,

Plaintiff-Appellee,

against

HAROLD W. COLDWELL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

—o—

JOINT BRIEF FOR PLAINTIFFS-APPELLEES

Preliminary Statement

As part of the prior appeal, *Lenfest* v. *Coldwell*, 525 F.2d 717 (2nd Cir. 1975) (Docket Nos. 74-2659 and 74-2660), a Joint Appendix of 161 pages and two Joint Exhibit Vol-

umes totaling 529 pages were prepared and filed. For the convenience of the Court, three of each of these will be supplied to the panel assigned to hear argument of the current appeal, prior to oral argument. This should prove to be of particular assistance to the Court in considering "Point II" of this answering brief.

Issues Presented for Review

1. Did SS PANOCEAN become a "constructive total loss" as a result of marine perils encountered while transiting the Atlantic Ocean westbound during February 24-April 3, 1964 with resultant triggering of the assureds' right to recover under their marine policies of Anticipated Profit insurance?

2. Did, in the alternative, SS PANOCEAN become an "arranged total loss" as a result of the aforesaid marine perils and in the context of the subsequent resolution of the shipowner's unrepaired hull damage claim against its insurance underwriters, also with resultant triggering of the assureds' right to recover under their marine policies of Anticipated Profit insurance?

Statement of the Case

The Court of Appeals set forth in its decision following the prior appeal, 525 F.2d 717 (1975), particulars regarding the marine insurance policies involved, described the "calamitous" voyage, outlined the course of the insurance adjustment between the shipowner and its London hull and machinery insurance underwriters, and reviewed certain aspects of the first of the two decisions below. Appellees accept this summary as accurate (except the reference at 525 F.2d 722 to Marine Midland Bank, which actually was the shipowner's mortgagee, as Ferro-Bet's chief financier).

The "Statement of the Case" in the opening brief of the Anticipated Profit insurance underwriters is in error at page 3 where it says that the $150,000.00 sum insured is payable "only" in the event of a total or constructive loss of the vessel. Other heads of coverage included ". . . Arranged and/or Compromised Total Loss as a result of Marine . . . perils." (Pls. Ex. 1, 128a).

Underwriters' "Statement of the Facts" is misleading at page 5 of their brief where it is stated that Mr. Grundvig, president of Ferro-Bet, "financed the purchase of the vessel". The prime financier of the ship purchaser, Pan Ocean Navigation Line, S.A., was the bank, Marine Midland. (Pls. Ex. 30 (A), 265a-266a).

Underwriters' "Statement of the Facts" errs also at page 6 where it is stated:

> "The calls at the Azores and Bermuda were not caused by damage to hull or machinery. They were made solely to replenish supplies of fuel and water lost through independent acts of the crew".

It has been stipulated that "[i]t was necessary for the vessel to put into the Azores and Bermuda as 'ports of refuge' before Baltimore could be reached." (Jnt. Ex. 1, 285a). On each leg of the westbound transit—Flushing to Azores, Azores to Bermuda, and Bermuda to Baltimore—SS PANOCEAN took a terrible physical battering, both topside and in the engineering spaces, from the combination of whole gales, phenominal seas, and crew negligence. (Pls. Ex. 15, 204a-215a; Pls. Ex. 39, 383a).

ARGUMENT

POINT I

The vessel had become a constructive total loss at Baltimore.

At the hearing on remand the Anticipated Profit assureds presented as a witness an expert maritime adjuster, Harold S. Bowser, to tabulate the pertinent figures from the exhibits and to demonstrate to the District Court that these figures, when totaled, greatly exceeded the $240,000.00 hull and machinery insurance valuation of SS PANOCEAN. Mr. Bowser worked with the exhibits and came up with a claimable sum amounting to $257,206.06. (Bowser, 48a-60a).

The District Court, on remand, reviewed the supplemental exhibits and testimony and found a total, although not as high as that of Mr. Bowser, which nevertheless exceeded $240,000.00. (Op., 88a). The Anticipated Profit assureds contend that what the District Court included was proper and, additionally, that there are further items which should have been embraced in the tabulation.

A. The $9,631.91 crew wages and provisions item was properly included.

If the crew was "necessary in connection with the repair of the vessel", the wages and crew maintenance are allowable as items in calculating a constructive total loss. *Lenfest v. Coldwell*, 525 F.2d 717, 725 (2nd Cir. 1975). The District Court found as a fact that "the costs of keeping the crew together at Baltimore was [sic] a direct consequence of the damage the vessel suffered at sea, and should be allowed." (Op., 87a-88a). Furthermore, the shipowner needed competent men (in the engine room and to look after the ship) and a watchman on a twenty-four hour basis. (Grundvig, 52a-53a). The crew was also needed to conduct a dock trial,

the vessel having come off drydock on April 12, 1964 and May 1, 1964. (Pls. Ex. 15, 234a and 236a). In any event, not all of the crew was kept aboard the vessel for the full period of repairs at Baltimore. (Pls. Ex. 33, 357a).

Insurance underwriters engage to pay the amount of the expenditures and losses directly flowing from the perils insured against, *Bradlie* v. *Maryland Insurance Co.*, 37 U.S. 263, 281, 12 Pet. 378 (1838), and this should include the crew items in question. The keeping of the crew on hand "related" to the ship's repair. *Lenfest* v. *Coldwell*, 525 F.2d 717, 722 (footnote #11).

Insurance underwriters cite *Hall* v. *Ocean Insurance Company*, 38 Mass. (21 Pick.) 472 (1839), as authority for the exclusion of the cost of officers and crew. In that case, however, there was a clause in the insurance policy to the effect that the underwriters were not answerable for wages and provisions except in general average. (38 Mass. p. 474 and p. 481). In another case of nearly the same vintage, *Fireman's Ins. Co.* v. *Fitzhugh & McConnell*, 43 Ky. 160, 4 B.Mon. 160 (1843), stores and wages of officers and crew were allowed in a "particular average" situation under circumstances somewhat analogous to SS PANOCEAN's situation approaching and while at Baltimore.

SS PANOCEAN's hull and machinery coverage, with which the Anticipated Profit policies in suit herein interact in part, expressly included General Average ". . . as per York/Antwerp Rules 1924 or 1950 steamer's option." (Pls. Ex. 9, 178a). In this country, as in England, wages of crew while a vessel is being repaired have come to be considered general average costs. *Lenfest* v. *Coldwell*, 525 F.2d 717, 726 (footnote #18). If there is any ambiguity with respect to the mechanics of the interaction between the two coverages, such ambiguity should be resolved in favor of the Antici-

pated Profit assureds. The crew wages, etc., should be included as a general average item covered by the marine policies of insurance.

It is conceded that Baltimore was a "port of refuge" for SS PANOCEAN. (Wood, 43a; Bowser, 60a). In most countries, putting into a "port of refuge" in order to repair is treated as a general average act, giving right to compensation, not only for the bare cost of reaching a place of safety, but also for all expenses incident to the remaining there and coming out again. The law recognizes as one of those expenses the shipowner's loss from having to pay and feed the crew during this forced suspension of the voyage. *Lowndes & Rudolf, The Law of General Average* (9th ed. 1964) 315, p. 177. Although in England this is not the practice, in the United States it is. *Hobson* v. *Lord,* 92 U.S. 397 (1896) (not necessary that ship bear away for repairs to a "port of refuge" outside of the regular course of the voyage); *United States* v. *Los Angeles Soap Co.,* 83 F.2d 875, 890 (9th Cir. 1936).

The liability of an insurer for a general average contribution of an insured is determined by the law of the port of destination. *British & Foreign Marine Ins. Co.* v. *Maldonado,* 182 Fed. 744, 750 (9th Cir. 1910), *cert. den.* 220 U.S. 622 (1911). In a suit on a marine insurance policy, ". . . if the loss or expense claimed has through sea perils fallen upon the ship to her 'hurt, detriment or damage', the claim is within the policy, and the insurers, according to all authorities, should be held to their direct obligation to pay it, without reference to any collateral remedies against other persons upon a general average adjustment". *International Nav. Co.* v. *Atlantic Mut. Ins. Co.,* 100 Fed. 304, 311 (D.C.S.D.N.Y. 1900), *aff'd per curiam* 108 Fed. 987 (2nd Cir. 1901), *pet. den.* 181 U.S. 623 (1901). The general rule is that a general average sacrifice or expense by an interest

can be recovered in full from the underwriters on such interest as a partial loss permitting the underwriters to collect by subrogation in general average any contribution due from the other interests. *Gulf Refining Co.* v. *Universal Ins. Co.*, 32 F.2d 555, 557 (2nd Cir. 1929), *cert. den.* 280 U.S. 584 (1929). Under this general rule, the full crew wages, etc., item should be included in the constructive total loss tabulation irrespective of what underwriters were entitled to do with respect to the item by way of subrogation.

Defendant underwriters' presentation has cited English case law and authority. Federal courts look to the laws of England for guidance in matters of marine insurance and follow them unless, as a matter of policy, a different rule has been adopted. *Aetna Ins. Co.* v. *Houston Oil & Transport Co.*, 49 F.2d 121, 124 (5th Cir. 1931), *cert. den.* 284 U.S. 628 (1931). *Cf. Saskatchewan Government Ins. Office* v. *Spot Pack*, 242 F.2d 385 (5th Cir. 1957) ("English Rule" vis-a-vis "American Rule"). To the extent that the English cases conflict with the American cases, they should be disregarded.

B. Costs of "recovery and repair" included the costs of the Azores and Bermuda deviations.

The Court of Appeals on the first appeal stated at 525 F.2d 725:

> "There is no dispute that the damage repaired at Baltimore resulted from the insured-against perils—heavy weather and crew negligence. There was ample evidence in the record to support this finding."

It is not now open to the insurance underwriters to challenge this finding nor the stipulated circumstance that the Azores and Bermuda were "ports of refuge". (Agreed fact No. 8, 284a-285a).

Both the District Court and the Court of Appeals have cited *Compania Maritima Astra, S.A.* v. *Archdale,* 134 N.Y.S. 2d 20 (1954), which stated the relevant proposition as follows at 134 N.Y.S. 2d 26:

> "In the calculation of repair and recovery costs it is proper to include expenditures necessary to deliver the ship from its peril to a port of safety and thereafter to make it a seaworthy vessel."

Young v. *Union Insurance Co.,* 24 Fed. 279 (D.C. Ill. 1885), was one of the cases cited in *Compania, supra.* In the *Young* case a schooner had stranded on the east shore of Lake Michigan during a gale, was gotten afloat and towed to Northport (not a port where repairs could be effected), then towed towards Chicago but taken back to Northport because of tempestuous weather, laid up there for the winter and, after having been abandoned to its insurer, was towed at the instance of the insurer to Chicago where it was repaired and tendered back to the assured. The assured refused to receive the schooner back and sued for a constructive total loss under the marine policy of insurance. The defendant insurer contended that the assured could not add the cost of repairs to the cost of getting the schooner off the beach and getting her to a port of safety and repairs for the purpose of proving a constructive total loss. In holding in favor of the plaintiff assured, the District Court said at page 283:

> ". . . [T]here can be no doubt from the proof that the damages by reason of the disaster in question consisted, first, in the expense of getting the schooner afloat, and getting her to a port of safety and repair, including the care and keeping of the schooner in the interval between the time she was

> got afloat and the time she reached a port of repair, and the cost of repairing her, so as to put her in as good a condition as she was before the disaster; . . ."

It is not necessary that a vessel be in the grip of immediate disaster before having recourse to a "port of refuge." Insurance underwriters' brief (pp. 12-16) overlooks the precept that it is sufficient that, in the opinion of the master, it would be dangerous for the vessel to continue on her voyage. *Buglass, Marine Insurance and General Average in the United States* (1973) p. 155.

C. The Michael G. Markogianis, Inc. survey fee in the amount of $8,207.10 should be allowed.

The expenses of surveys and superintendence are allowable. *Compania Maritima Astra, S.A.* v. *Archdale,* 134 N.Y.S. 2d 20, 26 (1954). As stated in *Buglass, Marine Insurance and General Average in the United States* (1973) at page 102, "[*s*]urvey fees and superintendence expenses also form a constituent of the reasonable cost of repairs". Rule XV of the Association of Average Adjusters of the United States' "Rules of Practice" states:

> "Fees of Classification Societies for surveys of particular average damages shall be allowed (notwithstanding that a survey of such damages would have been required for classification purposes) in addition to a fee paid an independent surveyor."

Buglass, supra, Appendix B, p. 358

Bureau Veritas was, in fact, the Classification Society involved at the time. (Pls. Ex. 21, 311a, 341a-342a; Pls. Ex. 33, 358a-360a). With respect to the "Markogianis" survey, the defendant insurance underwriters offered no evidence at the trial nor during the subsequent evidentiary hearing on remand attacking the reasonableness of the

amount of this fee which had been passed upon by the average adjusters. (Pls. Ex. 28 [item #35], 343a).

D. The parts and labor items should be allowed.

The "Draft Adjustment" (Pls. Ex. 28, 343a) lists two of the contested items as follows:

Item 27	Neptune Machine—Replacement engine parts due H/W	$ 1,043.00
Item 29	Neptune Machine—Labor Eng.	$ 525.00

The first of the two items is supported by a detailed invoice (Def. Ex. AA, 400a) dated June 16, 1964 marked "Paid Jul 23 1964". H/W stands for "heavy weather" and, presumptively, this was the cause of the damages.

The second of the two items is supported by an invoice (Def. Ex. AA, 401a) dated June 23, 1964 also marked "PAID". If an experienced average adjuster, Mr. Wood, included it in his table, *prima facie*, at least, it should be allowable. Defendant underwriters offered no testimony to show why the item should be disallowed.

The "Draft Adjustment" (Pls. Ex. 28, 343a) lists two other contested items as follows:

Item 30	T. Corros—Labor on engine	$ 464.50
Item 31	G. Karaisaridis—Labor on engine	$ 301.00

Supporting receipts for payment, dated June 12, 1964 and June 18, 1964, respectively, are in the record. (Def. Ex. AA, 403a-404a). For the reasons stated with respect to the first two items above, appellees contend that the items should be included.

E. The "Port Disbursements" (Item 15 on Pls. Ex. 28, 343a) at Baltimore amounting to $11,097.96 should be included in the constructive total loss calculations.

At the hearing on remand, Mr. John H. Wood, the adjuster who had prepared the "Draft Adjustment" (Pls. Ex. 28), was unable to provide a breakdown of this item. (Wood, 70a-71a). Part of it, he indicated, would relate "to tugboats, pilots, and things of that nature, directly related to the repair of the vessel". (Wood, 71a). Mr. Bowser, plaintiffs' expert witness, said: "Well, I know the man who drew it up is a qualified adjuster, and the items that he put in there would belong." (Bowser, 61a). See: *Empire Stevedoring Co.* v. *Oceanic Adjusters, Ltd.*, 315 F. Supp. 921, 927 (D.C.S.D.N.Y. 1970) (the profession of average adjusting is said to enjoy a very high reputation for fairness).

The Court of Appeals (at 525 F.2d 724) stated a guide particularly applicable, assureds submit, to this item, as follows:

> "The relatively helpless position of the charterer in the face of loss of freight and anticipated profit, a condition known in advance to the insurer, suggests that we interpret with some liberality the costs allowable in determination of whether there was a constructive total loss."

Compare: *Chicago S.S. Lines* v. *United States Lloyds*, 12F 2d 733, 738 (7th Cir. 1926) ("high probability" test applied in determining whether or not there was a constructive total loss), cert. den. 273 U.S. 698 (1926).

Insurance underwriters would have the Court infer from speculative testimony at the hearing (Bowser, 61a) that the item reflects an "agency account", and that such an item is not allowable. (Wood, 71a). Mr. Wood's hand-

written notes (Pls. Ex. 27) refute this, however, where on page four thereof (242a) they contain the following entry:

> "(H) Miscellaneous Expenses: Trans Marine Shipping Agency, Inc., account for agency fees, cables, long distance calls, etc., all in connection with these insurance claims 4000.00"

Thirteen casualties are listed at the head of this exhibit, at least the last five of which (Crew Negligence—June 18, 1964; Stranding—June 22, 1964; Deviation/Detention Port Everglades—June 22-July 12, 1964; Crew Negligence—Sept. 20, 1964; and Towed into Gramercy, La. Sept. 22-24, 1964) did not relate to Baltimore. Plaintiffs submit that only a portion of the $4,000.00 might have been included in the Baltimore "Port Disbursements" item; and, if there was such a portion so included, such portion would have been "in connection with these insurance claims" (Pls. Ex. 27, 242a), related to the Baltimore repair, and allowable in calculating the constructive total loss sum.

The insurance underwriters offered no evidence impugning this item. The attorneys for the Anticipated Profit insurance underwriters also represented SS PANOCEAN's hull underwriters in arranging a settlement of the shipowner's unrepaired damage claim. Surely, then, the Anticipated Profit underwriters were in a position to come forward with a further explanation of the item. They having failed to do so, the assureds' burden with respect to the ports disbursements, it is submitted, has been carried.

F. This Court should allow the assureds' claim for "extras" and/or "contingency allowance" in the sum of $7,773.75.

On the first appeal this Court of Appeals stated at 525 F.2d 725 (footnote #17):

> "The difficulties in reaching accurate estimates of what repair costs would have been is to some extent

compensated by the practice of adding a contingency allowance to the amounts calculated in determining constructive total loss." (Citations omitted).

Following the hearing on remand, the assureds submitted "Plaintiffs' Proposed Findings of Fact and Conclusions of Law" (Document No. 77 in Record on Appeal) dated April 23, 1976 and *proposed* Conclusion of Law No. 21 read as follows:

> "21. The District Court has found that plaintiffs have proved a constructive total loss figure at Baltimore substantially in excess of SS PANOCEAN's hull insurance valuation. This is apart from adding to the $257,206.06 figure anything in respect of "extras" or "contingency allowance". See: *Compania Maritima Astra, S.A.* v. *Archdale,* 124 N.Y. Supp. 20, 46 (Sup. Ct. N.Y. Cty 1954) (twenty percent allowed); *The Medina Princess,* (1965) 1 Lloyd's List L.R. 361, 407-408 (ten per cent allowed). The District Court finds it appropriate to add fifteen percent to the deferred items at Baltimore—port boiler ($49,340.00) and struck locks ($2,485.00). This computes to be a sum of $7,773.75 to be added to the $257,206.06, making a grand total of $264,979.81."

The District Court did not pass upon this proposed item on remand (Op., 81a-88a). The Anticipated Profits assureds submit that there is enough in the Record on Appeal herein to open the way for the Court of Appeals to allow the $7,773.75 item without a second remand. (Bowser, 66a-67a).

POINT II

There was, in the alternative, an "arranged" total loss of the vessel.

This contention was briefed by Anticipated Profit assureds in the prior appeal (Docket Nos. 74-2659 and 2660) under "POINT III" of the opening brief. The Court of Appeals remanded this issue for findings of fact and conclusions at law at 525 F.2d 728.

The word "arranged" means more than "compromised" and covers more than "compromised". *Gurney* v. *Grimmer* (1932) 38 Com. Cas. 7, 15. The District Court below merely held (Op., 83a-84a) that ". . . it has not been demonstrated that the funds paid to the owners by the hull underwriters were in settlement of a constructive total loss claim."

At the hearing on remand Mr. Wood, the shipowner's average adjuster, referred to the "overall settlement" which he also termed a "compromise settlement". (Wood, 14a). A general average undertaking (Pls. Ex. 34, 361a) was taken at Baltimore but the issuance of a formal general average statement was not pursued by the shipowner, the issuance of it having apparently been abandoned as part of the arranged settlement between the shipowner and its hull underwriters.

Insurance underwriters presented no witnesses from London, by deposition or otherwise. See, by way of comparison, *Oscar L. Aronson, Inc.* v. *Compton,* 495 F.2d 674 (2nd Cir. 1974), wherein the Manager of Lloyd's Underwriters' Claims Office gave testimony. The burden is upon Anticipated Profit insurance underwriters to show that there was not an "arranged" (or "compromised") total loss. See: *Street* v. *Royal Exchange Assurance,* [1914] 19

Com. Cas. 339, 349. The Court of Appeals herein should find that that burden has not been carried.

The assureds anticipate that insurance underwriters will argue that a cross notice of appeal should have been filed to enable these arguments to be made. On appeal, however, an appellee may urge in support of the judgment under review any matter appearing in the record, and he may do this without the necessity of taking a cross appeal. 36 *C.J.S.* (*Federal Courts*) 297(17)(b). See also: *Equal Employment Opportunity Commission* v. *Union Bank*, 408 F.2d 867, 869 (9th Cir. 1968).

CONCLUSION

The Order and Judgment below (90a-91a) entered on July 26, 1976 should be affirmed.

Respectfully submitted,

W. Shelby Coates, Jr.
Appellate Counsel for Appellees in First Action

Wilbur E. Dow, Jr.
Attorney of Record for Appellees in First Action

Joseph D. Tarlowe
Attorney for Appellee in Second Action